

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CAPELLO *et al.*,

Plaintiffs,

V.

SELING, *et al.*,

## Defendants.

Case No. C02-5242RBL

REPORT AND  
RECOMMENDATION  
REGARDING  
CHARLES TILLMAN

**NOTED FOR:  
JULY 7<sup>th</sup>, 2006**

This Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Before the court is a summary judgment motion filed by defendants. This Report and Recommendation deals only with the claims of Charles Tillman.

## PROCEDURAL HISTORY

Defendants filed a large number of summary judgment motions during July of 2004. The dispositive motion cut off date was July 30<sup>th</sup>, 2004. (Dkt. # 195). The motions were supported by a general brief and declarations. (Dkt. # 229 and 230 through 242). On July 28<sup>th</sup>, 2004, defendants filed a memorandum specific to Mr. Tillman. (Dkt. # 334). The

1 memorandum and attached declarations addressed the mental health treatment available and  
2 issues specific to Mr. Tillman. (Dkt. # 334, 335).

3 Plaintiffs filed a single response to all the summary judgment motions. (Dkt. # 404).  
4 While the court had authorized each plaintiff to file an over length brief, the court did not  
5 authorize the filing of this document which contained over one thousand pages of briefing and  
6 materials.

7 Plaintiff supports his response with a number of declarations. (Dkt. # 405 through 421).  
8 Plaintiff also submits his own declaration with attachments. (Dkt. # 411). Defendants reply and  
9 note that none of the information provided by plaintiff creates a genuine issue of material fact  
10 that implicates any named defendant in this action. (Dkt. # 401).

11 FACTS AND CLAIMS

12 This action is one in a series of legal actions regarding the Special Commitment Center  
13 (SCC). Plaintiffs challenge the mental health treatment provided and conditions of confinement.  
14 The plaintiffs are all persons confined for mental health treatment. The SCC is designed to treat  
15 persons whose mental abnormalities or personality disorders make them likely to engage in  
16 predatory acts of sexual violence. (Dkt. # 229, page 3).

17 For over a decade the SCC operated under federal oversight as a result of injunctions  
18 issued by the United States District Court in Seattle. In 1991 the court found conditions of  
19 confinement unconstitutional and found the mental health treatment offered inadequate. Turay  
20 v. Seling, C91-0664RSM. On June 19<sup>th</sup>, 2004 the court found the defendants in substantial  
21 compliance and lifted the injunctions with one exception. Turay v. Seling, C91-0664RSM (Dkt  
22 # 1906).

23 This plaintiff, Mr. Tillman, was first sent to the SCC as a pre trial detainee in November  
24 of 2001 and was awaiting trial at the time defendants moved for summary judgement. (Dkt. #  
25 334, page 2).

26 Mr. Tillman's Civil Commitment Evaluation diagnosis includes " Axis I: Paraphilia Not  
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1 Otherwise Specified, Non-consent; Exhibitionism; Alcohol Dependency in a controlled  
2 environment; Axis II: Personality Disorder Not Otherwise Specified with Antisocial and  
3 Narcissistic Traits.” (Dkt. # 335, declaration of Holly R. Coryell, Attachment B, page 5)

4 Dr. Coryell, in her declaration, states that in her professional opinion the treatment  
5 available to plaintiff provides plaintiff with an opportunity to improve the conditions for which  
6 he is committed. (Dkt. # 335). The Plaintiff has not contradicted the factual representations or  
7 assertions made by defendants.

8 Mr. Tillman has participated in treatment to a limited extend but refuses to make  
9 disclosures concerning any “alleged overt act.” (Dkt. # 335, declaration of Holly R. Coryell,  
10 Attachment B, page 3). At the time of his deposition plaintiff was at phase II and believed he  
11 was being moved to phase III of treatment. (Dkt. # 334, Exhibit 1, deposition of Charles  
12 Tillman, page 6). After his deposition Mr. Tillman submitted a declaration in which he states  
13 that he participated in treatment for the first 15 months he was at the SCC, but, has since  
14 “dropped out.” (Dkt. # 411, page 2).

15 Defendants’ motion for summary judgement is very specific. Defendants seek summary  
16 judgment because the complaint does not “accurately represent each plaintiff’s claims, and  
17 because **each plaintiff must demonstrate the merit of his own claims to go forward.**” (Dkt.  
18 # 229)(emphasis added). Defendants ask for summary judgment based on the Eleventh  
19 Amendment, qualified immunity, personal participation, and lack of a constitutional violation.  
20 (Dkt. # 229, pages 18 through 37). In essence, defendants argue that none of the plaintiffs can  
21 show an injury of constitutional magnitude specific to that plaintiff.

22 In his declaration, plaintiff explains his reasons for dropping out of treatment. (Dkt. #  
23 411). Nowhere in the declaration does plaintiff mention any action taken by any named  
24 defendant in this suit. The named defendants are Mark Seling, Robert Smith, Vince Gollogly,  
25 Lyle Quasim, and Dennis Braddock. Mark Seling is the former Superintendent of the SCC.  
26 Robert Smith is a former clinical director of the SCC. Lyle Quasim is the former Secretary of  
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1 the Department of Social and Health Services and Dennis Bradock is the current Secretary.

2 Vince Gollogly is the current clinical director of the SCC.

3 Defendants show that Mr. Quasim and Mr. Smith left their employment at SCC prior to  
4 plaintiff Tillman arriving at the facility. Thus, plaintiff cannot show that any action taken by  
5 these two defendants denied plaintiff any constitutional right.

6 Plaintiff provides no evidence to show the treatment offered him is inadequate. (Dkt. #  
7 411). Plaintiff complains regarding: Behavior Management Reports written against him that  
8 were later dismissed on appeal or at hearing, a therapist allegedly entering incorrect information  
9 regarding his diagnosis, not being advanced to a higher phase of treatment, and problems he has  
10 had in obtaining medical treatment. (Dkt. # 411).

11 Defendants respond to each issue and show lack of personal participation. Defendants  
12 also show issues, such as search of a computer, or medial treatment, did not involve a  
13 constitutional violation. (Dkt. # 401).

14 With regard to medical treatment defendants show that plaintiff did not appear for three  
15 scheduled appointments. He was seen August 4<sup>th</sup>, 2004 at which time a podiatrist performed a  
16 “minor procedure” and did not recommend further treatment. (Dkt. 3 401). Again, plaintiff  
17 fails to show how any named defendant participated in his medical treatment.

18 Defendants note:

19 Mr. Tillman provides no facts to show that Drs. Gollogly or Seling  
20 personally participated in an alleged constitutional violation. Defendants Quasim  
21 and Smith left their positions before Mr. Tillman arrived at the SCC. Declaration  
22 of Beverly Wilson ¶¶ 2, 5 (dkt. #242); Tillman Dep. at 8 (dkt. # 334, Ex. 1). Mr.  
23 Quasim and Dr. Smith, therefore, could not personally have participated in any  
alleged violation of Mr. Tillman’s rights. *See Memorandum ¶ III.C.3.* (dkt. #  
229). Accordingly, the Court should dismiss all claims as to the defendants in  
their personal capacities. *See Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir.  
1988).

24 Plaintiff places great weight on the findings of fact made in Turay v. Seling, and other  
25 cases without a showing that the findings apply to him. Thus, Mr. Tillman continues to argue  
26 this action in the abstract. By way of example, he argues damages are “best weighed by

1 everyday spent without constitutionally adequate mental health treatment and more considerate  
 2 conditions of confinement than prisoners.” (Dkt. # 404 page 6). Plaintiff has no evidence to  
 3 support his assertions that the treatment offered him is in any was inadequate. Plaintiff’s  
 4 response does not meet the requirement of a specific evidentiary showing. Further, plaintiff fails  
 5 to show that any named defendant played any part in the alleged constitutional violations.

6 THE STANDARD

7 Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment “if the  
 8 pleadings, depositions, answers to interrogatories, and admissions on file, together with  
 9 affidavits, if any, show that there is no genuine issue of material fact and that the moving party  
 10 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56 (c). The moving party is entitled  
 11 to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on  
 12 an essential element of a claim on which the nonmoving party has the burden of proof. Celotex  
 13 Corp. v. Catrett, 477 U.S. 317, 323 (1985).

14 There is no genuine issue of fact for trial where the record, taken as a whole, could not  
 15 lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v.  
 16 Zenith Radio Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific,  
 17 significant probative evidence, not simply “some metaphysical doubt.”). *See also* Fed. R. Civ.  
 18 P. 56 (e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence  
 19 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions  
 20 of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T. W. Elec. Service  
 21 Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

22 The determination of the existence of a material fact is often a close question. The court  
 23 must consider the substantive evidentiary burden that the nonmoving party must meet at trial,  
 24 e.g. the preponderance of the evidence in most civil cases. Anderson, 477 U.S. at 254; T.W.  
 25 Elec. Service Inc., 809 F.2d at 630. The court must resolve any factual dispute or controversy  
 26 in favor of the nonmoving party only when the facts specifically attested by the party contradicts  
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1 facts specifically attested by the moving party. *Id.*

2 The nonmoving party may not merely state that it will discredit the moving party's  
 3 evidence at trial, in hopes that evidence can be developed at trial to support the claim. T.W.  
 4 Elec. Service Inc., 809 F.2d at 630.(relying on Anderson, supra). Conclusory, nonspecific  
 5 statements in affidavits are not sufficient, and "missing facts" will not be "presumed." Lujan v.  
 6 National Wildlife Federation, 497 U.S. 871, 888-89 (1990).

7 In addition, the court is mindful that an action for injunctive relief focuses on whether  
 8 the combined acts or omissions of state officials violate a constitutional right or duty owed the  
 9 plaintiff. In contrast, when a plaintiff seeks to hold a defendant personally liable the inquiry into  
 10 causation is more specific and focuses on that persons specific actions. Leer v. Murphy, 844 F.  
 11 2d. 628, 632 (9th Cir. 1988).

12 DISCUSSION

13 The plaintiffs' reliance on Turay is misplaced. The holdings do not equate to findings of  
 14 liability for damages against any named defendant because of the difference in standards of  
 15 proof between actions for injunctive relief and actions for damages. This difference was briefed  
 16 by defendants who stated:

17 As Judge Leighton explained in a similar case: "Turay has no talismanic  
 18 quality, the mere invocation of which conjures a cause of action." Hoisington, et  
al. v. Seling, et al., No. C01-5228-RBL, October 28, 2003, Order at 6 (dkt. #  
 19 189). Turay is of assistance to plaintiffs in this case only if (1) they are able to  
 20 identify a specific ruling from Turay that, for qualified immunity purposes, was  
 21 sufficient to put defendants on notice that their conduct potentially violated  
 22 plaintiffs' constitutional rights; or (2) they can point to a specific factual finding  
 23 from Turay that could apply by way of collateral estoppel. In either case, each  
 24 plaintiff must first show how a specific ruling or finding from Turay applies to his  
 25 situation and establishes a violation of his constitutional rights. In doing so, each  
 26 plaintiff must be aware that relief ordered in Turay does not represent the  
 27 constitutional minimum. *See Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir.  
 28 2000) ("A court may order 'relief that the Constitution would not of its own  
 force initially require if such relief is necessary to remedy a constitutional  
 violation.'"). In Sharp, the Ninth Circuit specifically noted that Judge Dwyer's  
 findings in Turay did not imply the existence of constitutional rights. Thus, for  
 example, Judge Dwyer's order that SCC provide residents private visitation  
 rooms and educational opportunities did not mean that the residents had a  
 constitutional entitlement to those things. *Id.*

1 (Dkt. # 229, pages 21 and 22).

2 The defendants filed a separate motion for summary judgment for each plaintiff that sets  
 3 forth the treatment provided or available to that person and that persons factual history. The  
 4 summary judgement standard requires a plaintiff to “present specific, significant probative  
 5 evidence.”” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

6 Mr. Tillman was informed of the summary judgment standard. (Dkt. # 195). The court  
 7 specifically informed plaintiff that if the opposing party moved for summary judgment he would  
 8 need to:

9 **[s]et out specific facts in declarations, deposition, answers to  
 10 interrogatories, or authenticated documents, as provided in Rule 56(e), that  
 11 contradict the facts shown in the defendant’s declarations and documents  
 12 and show that there is a genuine issue of material fact for trial. If you do  
 13 not submit your own evidence in opposition, summary judgment , if  
 14 appropriate, may be entered against you. If summary judgment is granted,  
 15 your case will be dismissed and there will be no trial. Rand v. Rowland, 154  
 16 F.3d 952, 962-963 (9th Cir. 1998)(emphasis added).**

17 (Dkt. # 195). (emphasis in original order). Mr. Tillman has failed to come forward with any  
 18 evidence to show that any right or duty owed to him has been violated by any named defendant.  
 19 His allegations in the complaint are unsupported by any evidence that shows he has suffered any  
 20 constitutional injury.

21 Plaintiff complains about a number of issues without providing any evidence to show  
 22 any named defendant played any part in the alleged conduct. (Dkt. # 411). While he complains  
 23 of his treatment he has not shown either personal participation or injury. He does not make any  
 24 allegation that a named defendant in this action ever denied or delayed medical treatment. The  
 25 same analysis is true for the remaining claims. There is simply no evidence that implicates any  
 26 named defendant. Defendants are entitled to summary judgment based on this plaintiffs lack of  
 27 evidence that he was subjected to any unconstitutional condition attributable to the actions of  
 28 any named defendant. The defendants are entitled to summary judgement as a matter of law.

#### CONCLUSION

29 Defendants are entitled to summary judgment as plaintiff has failed to show a  
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1 any injury. Defendants motion for summary judgment should be **GRANTED**. A proposed order  
2 and proposed judgment accompanies this Report and Recommendation.

3 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
4 Procedure, the parties shall have ten (10) days from service of this Report to file written  
5 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
6 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the  
7 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on  
8 **July 7<sup>th</sup>, 2006**, as noted in the caption.

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10 DATED this 9<sup>th</sup> day of June, 2006.  
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15 Karen L. Strombom  
16 United States Magistrate Judge  
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